No. 286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, *et als.,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 31, 1945.

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RECONSTRUCTION FINANCE CORPORATION, *et als.,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Denver and Rio Grande Western Railroad Company, the Debtor in the proceeding under Section 77 of the National Bankruptcy Act, hereby applies for a Writ of Certiorari to review the decrees of the United States Circuit Court of Appeals for the Tenth Circuit entered on May 10, 1945, reversing orders of the District Court for the District of Colorado approving and confirming a plan of reorganization under said Section 77 for the Petitioner and The Denver and Salt Lake Western Railroad Company, a wholly owned subsidiary of the Petitioner. A Petition for a Writ of Certiorari to review these decrees is in process of filing by Reconstruction Finance Corporation and certain others, as Petitioners. The granting of their petition would bring up part of the case but not all of the case. This Petitioner

believes that if this proceeding is to be brought to this Honorable Court at all on Writ of Certiorari it should be brought here in its entirety.

Especially is it important for this Court to be in a position to review so much of the decision of the Circuit Court of Appeals as purports to approve a finding that the claims of the Preferred stockholders and owners of Common Stock of the Debtor are valueless and that they may be lawfully barred from participating in a Plan of Reorganization—a finding said to have been left undisturbed by reason of the broad language of the opinions of this Court rendered March 15, 1943 in *Ecker et als.* v. *Western Pacific Railroad Corporation* and *Group of Institutional Investors, et als.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company.*

Accordingly, the Petitioner asks that a Writ of Certiorari issue to review said decrees in the event, but only in the event, that this Court (a) shall determine to grant Writs of Certiorari pursuant to a petition filed or to be filed herein by Reconstruction Finance Corporation and others as Petitioners, or (b) shall determine to review and reconsider its own decisions in *Ecker, et als.* v. *Western Pacific Railroad Corporation* and *Group of Institutional Investors, et als.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, and certain earlier decisions upon which those rendered on March 15, 1943 are in part based.*

This Petitioner contends and respectfully urges that the Petition for Writs of Certiorari filed by Reconstruction Finance Corporation and others is without merit and should be denied. To avoid duplication of the argument against the granting of that Petition, this Petitioner adopts as its

* The titles and the citations of the cases here referred to are: *Case* v. *Los Angeles Lumber Products Company*, 308 U. S. 109 (1939); *Consolidated Rock Products Company* v. *Du Bois*, 312 U. S. 510 (1941); *Ecker, et als.* v. *Western Pacific Railroad Corporation*, 318 U. S. 448 (1943); *Group of Institutional Investors, et al.* v. *Chicago Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523 (1943).

answer thereto such answer as shall be filed by the City Bank Farmers Trust Company, as Trustee under the Debtor's General Mortgage, reserving the right, however, to supplement such answer within the period permitted by the rules of this Court.

Should this Court nevertheless (a) either determine to grant said Petition for Writs of Certiorari, or (b) determine that the time is ripe for a comprehensive review and reconsideration of its own decisions in the cases referred to above, then this Petitioner respectfully asks that this Petition of the Debtor be granted as the basis for a reconsideration of all questions arising under Section 77 and Chapter X of the National Bankruptcy Act, including those referred to in the Report of the Judiciary Committee of the House of Representatives as set out in footnote 2 to the concurring opinion of Circuit Judge PHILLIPS, annexed hereto as Appendix A.

Reasons for the Granting of the Petitioner's Application for a Writ of Certiorari

The Petitioner respectfully specifies five rulings of this Court which it contends should be reconsidered and which are set out below in sections of this Petition, lettered from (a) to (e), both inclusive. The Petitioner contends that these rulings are unsound because contrary to precedent and predicated upon misinterpretations of the Congressional legislation referred to above.

(a) *Judicial Review Under Section 77.*

One of the most insidious encroachments upon fundamental rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution has been accomplished through the introduction into our scheme of Government of what is commonly referred to as "the administrative

Board." In the exigencies of the war the number of such Boards has increased to an alarming extent. Among the earliest, if not the earliest, of these Boards is the Interstate Commerce Commission, which over a period of nearly fifty years prior to the enactment of Section 77 of the National Bankruptcy Act had achieved a splendid record of public service.

Under a line of decisions of this Court which stem back to *Interstate Commerce Commission* v. *Illinois Central Railroad Company* (215 U. S. 471) the action of such a Board is for most, if not for all, practical purposes outside of the scope of effectual judicial review. In view of the increase in the number of such Boards and the vastly increased power which many of them enjoy, it may well be that this line of decisions should be reconsidered quite apart from the problems incident to railway reorganization. At least this seems to have been the view of the late Joseph P. Eastman, a profound student of Governmental problems, and for many years an outstanding member of the Interstate Commerce Commission. In an address delivered shortly before his death Commissioner Eastman said:

> "The courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction. The principle that it is an error of law to render a decision not supported by substantial evidence is a salutary principle. The courts should enforce it. * * *" (I. C. C. Practitioners' Journal, April, 1944, p. 627.)

Congress itself has been neither unmindful of the evil to which Mr. Eastman here refers, nor innocent of its implications. This was made manifest by its passage in 1943 of the Walter-Logan Act providing for an efficient judicial review of the action of many such administrative Boards, which failed to receive Presidential approval because of possible interference with the war effort.

But as early as 1933 when Congress formulated and adopted Section 77 of the National Bankruptcy Act, it recognized that the existing statutory provision for judicial review of the action of the Interstate Commerce Commission was inadequate and included a provision for a judicial review for which nothing even approaching a prototype can be found in any earlier Congressional legislation. This is the provision in subsection (e) that no Plan of Reorganization certified by the Interstate Commerce Commission may be approved by the Court unless the Court is "satisfied" that the plan

> "is fair and equitable, affords due recognition to the rights of each class of creditors or stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of various classes of creditors or stockholders."

Obviously no Court can be "satisfied" that a Plan of Reorganization is fair and equitable and meets the other requirements of subsection (e)if it knows that the Interstate Commerce Commission has undervalued the Debtor's Estate or has undercapitalized the reorganized company, or as in the instant case, has taken millions of dollars of impounded income from one creditor and given it to another creditor; or, if it is left in a state of constructive ignorance on these vital points. By explicit provisions of subsection (e) Congress gave creditors and equity owners an assurance that these things could not happen and that their liens and equities could not be confiscated unless the Court was "satified" as to every finding of fact and conclusion of law implicit in subsection (e). But by excluding from judicial review such findings and conclusions of the Interstate Commerce Commission as relate to valuation and capitalization this Court has for all practical purposes expunged subsection (e) as a part of Section 77 in so far as it relates to the function of the Court.

(b) *Inhibition of Interest Abatements.*

A new, and we submit an entirely erroneous doctrine, is engrafted upon the body of our reorganization law by the ruling of this Court under the former Section 77B of the National Bankruptcy Act in *Case* v. *Los Angeles Lumber Company* (308 U. S. 109) reiterated in subsequent cases that a Plan of Reorganization is unfair and inequitable which involves any abatement of past or future contract interest on senior lien debt. Many, if not most of the corporate reorganizations perfected in this last half century run counter to this ruling of this Court for which no authority at all is cited and which is contrary to the decision of this Court in *Canada Southern Railway Company* v. *Gebhard* (109 U. S. 527) where all accrued and unpaid interest on senior debt was unprovided for in a Plan of Reorganization held by this Court to be fair and equitable. This question is of critical importance in view of the current radical readjustments in the rates for the hire of money.

(c) *Reorganization vs. Liquidation.*

A ruling of this Court which is resulting in unnecessary and, we respectfully submit, unjustifiable sacrifice of many valuable equities is the ruling under the former Section 77B in *Du Bois* v. *Consolidated Rock Products Company* (312 U. S. 512) reiterated in subsequent cases that a Plan of Reorganization is unfair and inequitable which gives recognition to junior creditors and stockholders unless senior lien creditors are given "full compensatory treatment" and are "made whole." This ruling ignores the historical difference between reorganization and liquidation recognized in *Northern Pacific Railway Company* v. *Boyd* (228 U. S. 482) and is just as oppressive to the senior lienors as it is to those in the lower strata. It forces the senior creditor either to change from a creditor to an equity position and to assume responsibility for management which he does not want or to forfeit the going concern value which will be lost in liquidation.

(d) *The Shifting Back and Forth of the Effective Date of a Plan.*

It may well be doubted whether this Court fully understood the consequence of its ruling in the two cases decided March 15, 1943 that Congress intended to give to the Interstate Commerce Commission a plenary, unreviewable power to move backward and forward the effective date of a Plan of Reorganization without regard to its disturbance of vested property rights. Subsection (1) of Section 77 provides in clear, unambiguous language,

> "In proceedings under this Section * * * the rights and liabilities of creditors and of all persons with respect to the debtor and its property shall be the same as if * * * a decree of adjudication had been entered on the day when the debtor's petition was filed."

This fixes all property rights as of a specific date which Congress obviously did not intend to authorize an administrative Board to alter. It may well be that the Interstate Commerce Commission is given power to prescribe a more convenient date as the effective date of a Plan or as the date to be borne by new securities; but certainly not without providing for the adjustments necessary to preserve all property rights vested on the date which Congress specified. If this Court in its rulings in the two cases decided March 15, 1943 intended to hold that the Interstate Commerce Commission was empowered by subsection (b) or any other provision of Section 77 to alter rights as fixed by subsection (1)—a power claimed by the Commission and rather ruthlessly exercised—then the Petitioner respectfully urges that the rulings should be reconsidered.

(e) *Maximum Capitalization.*

That Congress did not, as this Court held in the two cases decided March 15, 1943, intend to give the Interstate Commerce Commission power to prescribe maximum capi-

talization in a proceeding under Section 77, has been made clear by the report of the Judiciary Committee quoted in the annexed concurring opinion of Circuit Judge PHILLIPS. Specific authority is given to the Commission by subsection (b) to limit the proportion of the total capitalization represented by fixed interest bearing debt—a provision which would be quite unnecessary if the Commission's power to limit all capitalization was plenary. The reason why the Commission's reorganization policy has failed so completely and has been subjected to such widespread criticism is that it has assumed a reduction of capitalization to be of more consequence in the public interest than the protection of private property.* But, as Circuit Judge PHILLIPS points out in his concurring opinion in this case—"Private property may not be taken in the public interest without just compensaton."

There are now pending in the Federal District Courts either in equity or under Section 77 of the National Bankruptcy Act twenty separate proceedings for reorganization of Class I Rail carriers. The aggregate of the equity securities of these twenty corporations is $1,305,447,300. If this Court permits the Interstate Commerce Commission to go forward in these twenty proceedings with the reorganization program which it claims is sanctioned by the two decisions of this Court rendered March 15, 1943, every dollar of this huge equity will be ruthlessly taken from the owners, although the Judiciary Committee has officially declared that these decisions were rendered under a misconception on the part of this Court of the intent and purpose of the National Bankruptcy Act.

WHEREFORE, your Petitioner respectfully prays that if upon application of Reconstruction Finance Corporation and others this Court issues in the cases hereinafter specified its writ of certiorari under the Seal of this Honorable

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* See Railroad Reorganization under Section 77 of the Bankruptcy Act, Congressional Record, June 27, 1945, Vol. 91, No. 128, page 6915.

Court directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record in the cases numbered on its docket, Nos. 2906, 2907, 3106, 3107, 3108, and entitled *In re: The Denver and Rio Grande Western Railroad Company, Debtor,* then and in that event it also issue such a writ pursuant to this Petition to the end that the determination and opinions of the Circuit Court of Appeals may be reviewed in respect of all questions before it and that your Petitioner be given such other relief in the premises as to this Court may seem proper.

Respectfully submitted,

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July 31, 1945.

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS

TENTH CIRCUIT

Nos. 2906, 2907, 3106, 3107 and 3108—NOVEMBER TERM, 1944.

In the Matter of The Denver and Rio Grande Western Railroad Company, a corporation, Debtor. The Denver and Rio Grande Western Railroad Company, a corporation, Debtor, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
The Denver & Salt Lake Western Railroad Company, a corporation, Debtor, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
City Bank Farmers Trust Company, a corporation, as Trustee under the General Mortgage, February 1, 1924, of The Denver and Rio Grande Western Railroad Company, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.

The Denver and Rio Grande Western Railroad Company, a corporation, Debtor; and The Denver & Salt Lake Western Railroad Company, a corporation, Subsidiary Debtor, Appellants, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
Guy A. Thompson, as Trustee of the Missouri Pacific Railroad Company, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.

[May 10, 1945]

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges

PHILLIPS, Circuit Judge, concurring:

The broad language of the Supreme Court in the Western Pacific case and the Milwaukee case[1] compels me to conclude that we cannot disturb the Commission's finding of valuation nor the finding of the Commission, confirmed by the trial court, that the equities of the unsecured creditors and the preferred and common stockholders have no value. Nevertheless, I feel impelled respectfully to suggest that the elimination of a substantial portion of the claim of the holders of the general mortgage bonds and all of the claims of stockholders and unsecured creditors, on the basis of a valuation resting wholly on an estimate of

[1] Ecker *v.* Western Pacific R. Corp., 318 U. S. 448; Group of Investors *v.* Milwaukee R. Co., 31 U. S. 523.

future earnings, is harsh treatment of such claims. I say this because, while according expertness to the Commission, it is my opinion that such future earnings cannot be estimated with a degree of certainty that is not likely to result in grave injustice.

The injustice to junior security holders which may result from a valuation based solely on an estimate of future earnings has aroused the attention of Congress and corrective legislation has been introduced. H. R. 4960 has already passed the House and is pending before a Senate Committee.[2]

On November 1, 1935, during the depths of the national depression, the debtor came into court for reorganization.

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[2] The House Judiciary Committee, in its unanimous report (78th Cong., 2d Sess., Report No. 1615) recommending passage of H. R. 4960, in part said:

"The purpose of the bill is to correct a very serious situation arising from the interpretation placed by the Interstate Commerce Commission and the courts upon the amendments of section 77 enacted by the Congress August 27, 1935. We believe this situation results from a misapprehension of the intention of Congress with respect to the 1935 amendments. The consequences have been and are so disastrous to railroad investors, and so dangerous to the credit of the railroads in general, that they should be corrected by legislation.

"From a legal standpoint, the problem may be stated simply. Section 77 was directed primarily to the relief of financially embarrassed railroad companies through a revision of their capital structures and a reduction of fixed charges. It does not expressly provide for any reduction in the existing total capitalization; but the Interstate Commerce Commission has interpreted paragraph (d) of the section as authorizing it to fix the total capitalization of the reorganized company. In so doing, it has estimated a 'capitalizable value of the assets' of the property based almost entirely upon 'earning power'—earning power of the property, past, present and prospective—as these words are used in section 77(e). Its estimates of prospective earning power are necessarily speculative. Nevertheless it has used its estimates of earning power to fix capitalizations in all cases very substantially below the existing capitalizations, regardless of the investment in the property and of the valuation previously determined by the Commission under section 19a of the Interstate Commerce Act. The Supreme Court in passing upon two major reorganization plans—the Western Pacific and the Chicago, Milwaukee, St. Paul & Pacific—upheld the Commission in this interpretation of the section, and has further held that the Commission's findings will not be disturbed where there is some evidence to support them. In other words, these administrative findings are beyond judicial review.

"The result of this interpretation of the statute by the Commission, and the subsequent refusal of the courts to review the Commission's findings, has caused the destruction of hundreds of millions of dollars of railroad securities representing actual investment in the property

At that time the debtor's senior debts ahead of the general mortgage bonds aggregated slightly over $101,000,000 and the claim of the general mortgage bondholders aggregated about $30,000,000. With an immediate reorganization, a capitalization of $132,000,000 would have been adequate to give the general mortgage bondholders new stock equal to 100 per cent of their claim. No capitalization or valuation ever proposed for the debtor, in any plan presented, has

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made, to some extent at least, in reliance upon the belief that such investments could not be confiscated except by due process of law.

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"In five major companies now undergoing reorganization, the reductions in capitalization aggregate some $600,000,000, meaning that this amount of railroad securities has been eliminated in the reorganization of these five companies alone, although there is no question that the investment in road and equipment and the 19a valuations at the present time are far in excess of the capitalization determined by the Commission. The same is true generally of the other roads involved in reorganization, these five being specifically mentioned, because they are included in one exhibit submitted to this committee by the Interstate Commerce Commission (hearings on H. R. 2857, serial No. 9 p. 199).

"That this situation has created an unbearable hardship upon the junior investors in railroad securities and constitutes a real danger to railroad credit may be easily seen from a glance at current railroad earnings. In 1942 the Missouri Pacific earned $32.67 a share on the common stock outstanding under the old capitalization; the Denver & Rio Grande Western, $34.40 a share; Rock Island, $25.11; Frisco, $18.03; St. Louis Southwestern, $27.23. These figures approximately were repeated in 1943, and the high earnings are continuing in 1944. Yet these stocks, which have demonstrated such an earning power, have been absolutely wiped out in reorganization, and the stockholders are without remedy. Moreover, the junior securities of all these roads have been drastically cut in reorganization and the senior securities have been very largely converted into income bonds and preferred and common stock. In one case, the Commission estimated a normal earning power of $11,000,000, and based its capitalization upon that figure; yet in the same year in which the Commission's plan was announced (1941) that road earned more than $18,000,000. In 1942, it earned $36,000,000, and in 1943 $37,000,000. Nevertheless the Commission still says the old common stock is worthless. The stockholders are without remedy. There is in practical effect no judicial review of the action of the Commission. Although its guess as to future earning power has been demonstrated to be wrong, its findings are final.

* * * * * *

"The primary purpose of the bill is to insure that the courts shall make an independent judicial review of each plan and of the evidence upon which the plan is based. Under the existing statute, the Commission is required to certify to the court a transcript of its proceedings; and the court is required to notify all parties and, if objections are filed, to have a hearing. The effect of the proposed amendments is to require the judge to make an independent judicial determination of the facts

been that low. During the eight years' delay in reorganization (in nowise due to the general mortgage bondholders, but, at least in part, to controversies among the senior security holders) and up to January 1, 1943, the effective date of the plan, the claims of the senior security holders, due to the accrual and nonpayment of interest, increased about $38,000,000. The debtor's net income available for interest during the trusteeship to the end of 1944 amounted to $49,420,972. It exceeded by approximately $9,500,000 the interest charges which accrued on the claims of senior security holders to the end of that year. As of December 31, 1935, the debtor's current assets were $9,727,230 less than its current liabilities. As of December 31, 1944, the debtor's current assets exceeded its current liabilities by $12,125,863.50. Thus, it will be seen there has been a favorable change in the current situation of $21,853,093, and, moreover, since the plan was formulated, the Junction Bonds have been paid and equipment obligations have been reduced from $5,758,000, the amount provided for in the plan, to $4,540,000, a reduction in that requirement of $1,218,000.

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found by the Commission, and not to hold that the administrative finding of the Commission is beyond judicial review. With this object in mind, the bill provides that the judge shall not only be satisfied that the plan complies with the provisions of subsection (b) as in the present statute, but must also be satisfied that it complies with the provisions of subsection (d), which the Supreme Court held was not within the province of judicial review. This will add nothing to the requirements of the present statute as to the hearing and the scope of the evidence; it will merely direct the courts to exercise the traditional right of review, and to give the parties and the public the benefit thereof.

"Second, and as a means of insuring that the Interstate Commerce Commission shall be guided by some standard in determining the permissible capitalization of the reorganized company, the bill provides that the existing total capitalization shall not be reduced below the lower of either the investment in the property or the physical valuation as previously determined by the Commission under section 19a. Naturally, if the existing capitalization exceeds the investment, it should be susceptible of reduction, if the Commission finds it is not supported by earning power; or, if the existing capitalization exceeds the physical valuation found by the Commission, it should be susceptible of reduction, unless in that event the Commission deems the earning power sufficient to support it. But where the existing capitalization represents actual investment in the property, or where it is not in excess of the value determined by the Commission under the mandate of law, then it should not be disturbed."

Approximately $43,000,000 of the income available, but not used, for the payment of interest has been expended in permanent improvements and betterments. While the investment value of the debtor's property thus was substantially increased, the Commission's valuation, based on estimated future earnings, was not increased proportionately. As a result, the claim of the senior security holders has increased and the participation of the general mortgage bondholders has been pressed downward until it is now fixed at 10 per cent of the new common stock. Many of the improvements and betterments referred to above, have substantially increased the capacity of the railroad to handle increased traffic as it arises. Central train control installed in many segments, where the greatest density of traffic obtains, gives to those segments, in a large degree, the equivalent of a double-track railroad and increases the number of trains that can be operated over the road and the volume of traffic that can be handled by the road. Other of such improvements have contributed to efficiency and economy in operations. These improvements have enabled the debtor to handle the great increase in traffic resulting from the war effort and have placed the debtor in a position to more economically and efficiently handle a volume of traffic largely in excess of its prewar traffic, should future economic conditions produce such traffic. Under the plan approved and confirmed by the district court, 90 per cent of the common stock goes to the holders of the senior securities and 10 per cent to the general mortgage bondholders. As a result, should there be a substantial increase in the debtor's postwar traffic over its prewar traffic, 90 per cent of the increased earnings will inure to the benefit of the holders of the senior securities and only 10 per cent to the general mortgage bondholders, whose claim was decreased 90 per cent by reason of the failure to discharge interest accruals with income available therefor and the diversion of such income to the cost of such permanent improvements. It seems to me, under all these circum-

stances, that, in addition to the other adjustments required to make the plan fair and equitable, the Commission should endeavor to modify the plan so as to give relief from the situation that lets the full impact of the improvement program fall upon the claim of the general mortgage bondholders and accords them no corresponding benefits.

By confirming the finding of the Commission that the equities of the unsecured creditors and the stockholders are without value, based on an estimate of future earnings, an estimate at best shrouded in uncertainty, the court, by judicial fiat, has forever forfeited and destroyed the rights and interests of such creditors and stockholders in the assets of the debtor, a result which, under well-settled principles, a court of equity will ordinarily avoid.

It may be urged that the elimination of the stock will provide the debtor with a stronger financial structure and enable it to better serve the public interests, but private property cannot be taken in the public interest without just compensation.

Even if viewed solely from the standpoint of future earnings, it would seem that it should not be said such stock is without value merely because, during periods of receding economy and depression, the earnings of the debtor will not be sufficient, after payment of prior claims, to provide funds from which dividends on such stock can be properly paid. Such stock has value, if, during periods of expanding economy and prosperity, the earnings of the debtor will be sufficient to provide for prior claims and leave a surplus from which substantial amounts can be lawfully paid as dividends thereon; and a finding of no value should not be made if there is reasonable probability that earnings will be realized from which substantial dividends can be paid, even though only during periods of economic prosperity.

It seems to me, under the facts presented on this record and those of which we may take judicial notice, that it is not unlikely the estimate of future earnings of the debtor made by the Commission will fall far short of its actual future earnings. Should the estimated earnings prove to be substantially under the actual earnings, the injustice that will result to the holders of the general mortgage bonds and to the stockholders of the debtor is obvious.

It may be reasonably assumed that a substantial portion of the war industries contributing traffic to the road will be succeeded by permanent industries. For example, it is common knowledge that the Kaiser Industries and one of the large Eastern steel companies have indicated a desire to acquire and continue the operation of the Geneva Steel Plant, a large and modern steel plant built on the debtor's line of railroad. In the areas tributary to debtor's line of railroad, there is an abundance of cheap power and of fuel and ore. Many heavy traffic-producing enterprises have been and are being established in new areas tributary to the debtor's line of railroad. It is reasonable to believe that this industrial development will continue.

Furthermore, changes in national income at constant prices have an approximately constant relationship to changes in ton-miles of traffic. It may be said, in general, that traffic is so related to national income that when that income rises by one billion dollars, traffic rises by about 6.6 billion ton-miles. Certain federal agencies have made estimates of the national income for the years 1947 to 1949. These estimates predict a national income of approximately 135 billion dollars in 1947 and a rising national income in 1948 and 1949, reaching 150 billion dollars in the latter year.[3] This would indicate a postwar railroad traffic reaching in 1949 a level of that traffic during 1943.

[3] See Post-War Traffic Levels, prepared by Spurgeon Bell, Head Transport Economist, and L. E. Peabody, Principal Transport Economist, of the Interstate Commerce Commission, pp. 42-71, 90-114.

Moreover, the ratio between ton-mile revenue of Class I railroads and the number of factory workers engaged in the production of durable goods is fairly constant. It is 100,000 revenue ton-miles for each factory worker. That there will be a determined effort to provide jobs for upward of 55 million workers early in the postwar period is a well-known fact. This indicates a greatly increased postwar railroad traffic. Moreover, the record demonstrates that, with the exception of a slight dip in 1923, the debtor has been securing a constantly increasing proportion of the operating revenues of Class I railroads. If the debtor should enjoy postwar earnings approximating its 1943 earnings, it is clear that the valuation found by the Commission should be substantially increased. But, as suggested above, it is my conclusion that only through corrective legislation or a more liberal attitude on the part of the Commission can the junior security holders obtain relief.